



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R2–ES–2012–0071]

[4500030113]

RIN 1018–AY21

Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; revision and reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to create a special rule under authority of section 4(d) of the Endangered Species Act of 1973, as amended (Act), that provides

measures that are necessary and advisable to provide for the conservation of the lesser prairie-chicken (*Tympanuchus pallidicinctus*). In addition, we announce the reopening of the public comment period on the December 11, 2012, proposed rule to list the lesser prairie-chicken as a threatened species under the Act. We also announce the availability of a draft rangewide conservation plan for the lesser prairie-chicken, which has been prepared by the Lesser Prairie-Chicken Interstate Working Group, and request comments on the plan as it relates to our determination of status under section 4(a)(1) of the Act.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **ADDRESSES** by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>.

In the Search box, enter FWS–R2–ES–2012–0071, which is the docket number for this rulemaking. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0071; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by one of the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Dixie Porter, Field Supervisor, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129; by telephone 918–581–7458 or by facsimile 918–581–7467. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This document consists of: (1) A proposed special rule under section 4(d) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), that outlines the prohibitions, and exceptions to those prohibitions, necessary and advisable to provide for the conservation of the lesser prairie-chicken; and (2) a reopening of the comment period for the

proposed rule to list the lesser prairie-chicken as a threatened species under the Act.

Why We Need To Publish a Proposed Rule. On December 11, 2012, the Service published a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73828). At that time, the Service indicated that we would consider whether to subsequently propose a section 4(d) special rule (hereafter referred to as 4(d) special rule). Section 4(d) of the Act specifies that, for threatened species, the Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation of the species. This proposed 4(d) special rule provides measures that are tailored to the conservation needs of the lesser prairie-chicken.

What Is the Effect of This Proposed Rule? At the time of the 2012 proposed listing rule (77 FR 73828), we indicated that we would consider whether to subsequently propose a 4(d) special rule for the lesser prairie-chicken. We are now proposing a 4(d) special rule and intend to finalize it concurrent with the final listing rule, if the results of our final listing determination conclude that threatened species status is appropriate.

The proposed 4(d) special rule allows for take of the lesser prairie-chicken incidental to activities conducted pursuant to a comprehensive conservation program that was developed by or in coordination with a State agency and that has been determined by the Service pursuant to the criteria outlined in this proposed rule to provide a net conservation benefit to the lesser prairie-chicken. Additionally, the proposed 4(d) special rule provides that any take of lesser prairie-

chickens incidental to agricultural activities that are included within a conservation plan developed by the Natural Resources Conservation Service (NRCS) for private agricultural lands in connection with NRCS's Lesser Prairie-Chicken Initiative (LPCI), as specified in this proposed rule, is not a prohibited action under the Act. If an activity resulting in take of lesser prairie-chicken is not exempted under this 4(d) special rule, then the general prohibitions at 50 CFR 17.31 would apply. We would require a permit for such an activity as specified in our regulations. Nothing in this proposed 4(d) special rule affects the consultation requirements under section 7 of the Act.

The Basis for Our Action. Under section 4(d) of the Act, the Secretary of the Interior has discretion to issue such regulations as [s]he deems necessary and advisable to provide for the conservation of the species. The Secretary also has the discretion to prohibit by regulation with respect to a threatened species any act prohibited by section 9(a)(1) of the Act.

Public Comments

To allow the public to comment simultaneously on this proposed 4(d) special rule, the proposed listing rule, and the draft rangewide conservation plan for the lesser prairie-chicken prepared by the Lesser Prairie-Chicken Interstate Working Group, we also announce the reopening of the comment period on the Service's December 11, 2012, proposed rule to list the lesser prairie-chicken as a threatened species under the Act. We intend to finalize the 4(d) special rule concurrent with the final listing rule, if the result of our final listing determination

concludes that threatened species status is appropriate. Any final action resulting from the proposed rules will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, general public, and other interested parties concerning the proposed listing rule and 4(d) special rule. We particularly seek comments regarding:

(1) The historical and current status and distribution of the lesser prairie-chicken, its biology and ecology, specific threats (or lack thereof) and regulations that may be addressing those threats and ongoing conservation measures for the species and its habitat.

(2) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Act, which are:

- (a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.

(3) Application of the Lesser Prairie-Chicken Interstate Working Group's draft

rangewide conservation plan to our determination of status under section 4(a)(1) of the Act, particularly comments or information to help us assess the certainty that the rangewide conservation plan will be effective in conserving the lesser prairie-chicken and will be implemented.

(4) Which areas would be appropriate as critical habitat for the species and why areas should or should not be proposed for designation as critical habitat, including whether any threats to the species from human activity would be expected to increase due to the designation and whether that increase in threat would outweigh the benefit of designation such that the designation of critical habitat may not be prudent.

(5) Specific information on:

- (a) The amount and distribution of habitat for the lesser prairie-chicken;
- (b) What may constitute “physical or biological features essential to the conservation of the species,” within the geographical range currently occupied by the species;
- (c) Where these features are currently found;
- (d) Whether any of these features may require special management considerations or protection;
- (e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why; and

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(6) Information on the projected and reasonably likely impacts of climate change on the lesser prairie-chicken and its habitat.

(7) Whether measures outlined in this proposed 4(d) special rule are necessary and advisable for the conservation and management of the lesser prairie-chicken.

(8) Information concerning whether it would be appropriate to include in the 4(d) special rule a provision that would allow continued enrollment in existing Candidate Conservation Agreements with Assurances for the lesser prairie-chicken. These existing agreements would be recognized as Service-approved conservation plans and their take authorization and continued enrollment would be provided for under this 4(d) special rule.

(9) Information concerning whether it would be appropriate to include in the 4(d) special rule a provision for take of lesser prairie-chickens in accordance with applicable State law for educational or scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act.

(10) Information concerning whether it would be appropriate to include in the 4(d) special rule a provision for take of lesser prairie-chickens in the course of State-managed hunting

programs for the lesser prairie-chicken or incidental to hunting activities directed at greater prairie-chicken (*Tympanuchus cupido*), including any information about State management plans related to hunting regulations and any measures within those plans that may avoid or minimize the risk of lesser prairie-chicken mortality incidental to lawful hunting for the greater prairie-chicken.

(11) Whether and how the Service should expand the scope of this 4(d) special rule to encourage landowners removing their lands from the Conservation Reserve Program to continue managing those areas for the benefit of the lesser prairie-chicken.

(12) Whether and how the Service should expand the scope of this 4(d) special rule to encourage farmers and ranchers not participating in the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative to manage their lands for the benefit of the lesser prairie-chicken.

(13) Whether the Service should expand the scope of this 4(d) special rule to allow incidental take of lesser prairie-chickens if the take results from implementation of a comprehensive lesser prairie-chicken conservation program that was developed by an entity other than a State agency or their agent(s).

(14) Additional provisions the Service may wish to consider for a 4(d) special rule in order to conserve, recover, and manage the lesser prairie-chicken.

We will consider all comments and information received during our preparation of a final determination on the status of the species and the 4(d) special rule. Accordingly, the final decision may differ from this proposal.

Please note that comments merely stating support for or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made “solely on the basis of the best scientific and commercial data available.”

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

A settlement agreement in *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10–377 (EGS), MDL Docket No. 2165 (D.D.C. May 10, 2011) was reached with WildEarth Guardians in which we agreed to submit a proposed listing rule for the lesser prairie-chicken to the **Federal Register** for publication by September 30, 2012. On September 27, 2012, the settlement agreement was modified to require that the proposed listing rule be submitted to the **Federal Register** on or before November 29, 2012. On December 11, 2012, we published in the **Federal Register** a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73828). The proposed listing rule had a 90-day comment period, ending March 11, 2013. We held a public meeting and hearing in Woodward, Oklahoma, on February 5, 2013; in Garden City, Kansas, on February 7, 2013; in Lubbock, Texas, on February 11, 2013; and in Roswell, New Mexico, on February 12, 2013. Pursuant to the settlement agreement, a final listing determination is to be submitted to the **Federal Register** on or before September 30, 2013, unless the Secretary finds that substantial disagreement exists regarding the sufficiency or

accuracy of the available data relevant to the listing determination, in which case the final listing determination is to be submitted to the **Federal Register** on or before March 31, 2014.

For information on previous Federal actions pertaining to the lesser prairie-chicken, please refer to the proposed listing rule, which we published in the **Federal Register** on December 11, 2012 (77 FR 73828).

Background

This document discusses only those topics directly relevant to the proposed 4(d) special rule for the lesser prairie-chicken. For more information on the lesser prairie-chicken and its habitat, please refer to the December 11, 2012, proposed listing rule (77 FR 73828), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R2–ES–2012–0071) or from the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

As discussed in the proposed listing rule, the primary factors supporting the proposed threatened species status for the lesser prairie-chicken are the impacts of cumulative habitat loss and fragmentation. These impacts are the result of conversion of grasslands to agricultural uses; encroachment by invasive woody plants; wind energy development; petroleum production; and presence of roads and manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings.

The Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as [s]he deems necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. Exercising this discretion, the Service developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the Act that apply to most threatened species. Alternately, for other threatened species, the Service may develop specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the Act, but the 4(d) special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and may be more or less restrictive than the general provisions at 50 CFR 17.31.

At the time of the proposed listing rule, we indicated that we would consider whether to subsequently propose a 4(d) special rule for the lesser prairie-chicken. In that proposed rule, we solicited public comments as to which prohibitions, and exceptions to those prohibitions, are necessary and advisable to provide for the conservation of the lesser prairie-chicken. In recognition of conservation efforts that provide for conservation and management of the lesser prairie-chicken and its habitat in a manner consistent with the purposes of the Act, we are now proposing a 4(d) special rule that outlines the prohibitions, and exceptions to those prohibitions,

necessary and advisable for the conservation of the lesser prairie-chicken.

Since the time of the proposed listing rule, the Lesser Prairie-Chicken Interstate Working Group, in association with the Western Association of Fish and Wildlife Agencies, has drafted a rangewide conservation plan for the lesser prairie-chicken. We would like to consider the conservation measures in this plan in our final listing determination for the lesser prairie-chicken. As such, we are reopening the comment period to allow the public an opportunity to provide comment on the draft plan as it applies to our determination of status under section 4(a)(1) of the Act, particularly comments or information to help us assess the certainty that the rangewide conservation plan will be effective in conserving the lesser prairie-chicken and will be implemented. The draft plan is available on the Internet in Docket No. FWS–R2–ES–2012–0071 at *<http://www.regulations.gov>*.

Provisions of the Proposed 4(d) Special Rule for the Lesser Prairie-Chicken

Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard protections for threatened species with special measures tailored to the conservation of the species that are determined to be necessary and advisable. Under this proposed 4(d) special rule, the Service proposes that all of the prohibitions under 50 CFR 17.31 and 17.32 will apply to the lesser prairie-chicken, except as noted below. The proposed 4(d) special rule will not remove or alter in any way the consultation requirements under section 7 of the Act.

Conservation Programs

The Service proposes that take incidental to activities conducted pursuant to a comprehensive conservation program that was developed by or in coordination with the State agency or agencies responsible for the management and conservation of fish and wildlife within the affected State(s), or their agent(s), that has a clear mechanism for enrollment of participating landowners, and that has been determined by the Service to provide a net conservation benefit to the lesser prairie-chicken, will not be prohibited. In making its determination, the Service will consider:

- (i) Whether the program comprehensively addresses all the threats affecting the lesser prairie-chicken within the program area;
- (ii) Whether the program establishes objective, measurable biological goals and objectives for population and habitat necessary to ensure a net conservation benefit, and provides the mechanisms by which those goals and objectives will be achieved;
- (iii) Whether the program administrators demonstrate the capability and funding mechanisms for effectively implementing all elements of the conservation program, including enrollment of participating landowners, monitoring of program activities, and enforcement of program requirements;
- (iv) Whether the program employs an adaptive management strategy to ensure future program adaptation as necessary and appropriate; and
- (v) Whether the program includes appropriate monitoring of effectiveness and

compliance.

The Service proposes this 4(d) special rule in recognition of the significant conservation planning efforts occurring throughout the range of the lesser prairie-chicken for the purpose of reducing or eliminating threats affecting the species. Multiple Federal and State agencies have developed localized conservation programs throughout the range of the lesser prairie-chicken, and these programs have provided a conservation benefit to the species. However, existing programs do not address the suite of factors contributing to cumulative habitat loss and fragmentation, the species' primary threat, across the entire five-state range of the lesser prairie-chicken.

The criteria presented here are meant to encourage the development of a coordinated and comprehensive effort to improve habitat conditions and the status of the species across its entire range. For the Service to approve coverage of a comprehensive conservation program under this 4(d) special rule, the program must provide a net conservation benefit to the lesser prairie-chicken population. Conservation, as defined in section 3(3) of the Act, means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary." The program must also be periodically reviewed by the Service and determined that it continues to provide a net conservation benefit to the lesser prairie-chicken. As a result of this provision, the Service expects that rangewide conservation actions will be implemented with a high level of certainty that the program will lead to the long-term conservation of the lesser

prairie-chicken.

Agricultural Activities

The Service proposes that take of the lesser prairie-chicken will not be prohibited provided the take is incidental to activities that are conducted in accordance with NRCS's Lesser Prairie-Chicken Initiative (LPCI).

The LPCI provides financial and technical assistance to participating landowners to implement practices beneficial to the lesser prairie-chicken that also contribute to the sustainability of landowners' agricultural operations. Conservation practice standards encompassed by the LPCI focus primarily on upland wildlife habitat management and include brush management, prescribed grazing, range planting, prescribed burning and restoration of rare and declining habitats. In all, 22 conservation practice standards are implemented under the LPCI.

The Service issued a conference report to the NRCS in connection with the NRCS's LPCI on June 30, 2011 (http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1044884.pdf), in which the Service determined that the proposed action, which incorporates the procedures, practice standards, and conservation measures of the LPCI, is not likely to jeopardize the continued existence of the lesser prairie-chicken. Conference procedures under section 7 of the Act are

required only when a Federal agency (action agency) proposes an activity that is likely to jeopardize the continued existence of a species that has been proposed for listing under the Act or when the proposed activity is likely to destroy or adversely modify proposed critical habitat. However, conference procedures may also be used to assist an action agency in planning a proposed action so that potential conflicts may be identified and resolved early in the planning process. During the conference, the Service may provide recommendations on ways to avoid or minimize adverse effects of the proposed action. The conclusions reached during a conference and any subsequent recommendations are then provided to the action agency in a conference report.

This provision of the proposed 4(d) special rule for agricultural activities will promote conservation of the species by encouraging landowners and ranchers to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing suitable habitat for the lesser prairie-chicken.

Proposed Determination

Section 4(d) of the Act states that “the Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation” of species listed as a threatened species. Conservation is defined in the Act to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.”

Additionally, section 4(d) states that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1).”

The courts have recognized the extent of the Secretary’s discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the Act was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. [S]he may, for example, permit taking, but not importation of such species,” or [s]he may choose to forbid both taking and importation but allow the transportation of such species, as long as the measures will “serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act” (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Section 9 prohibitions make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife

species listed as an endangered species, without written authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. Prohibited actions consistent with section 9 of the Act are outlined for threatened species in 50 CFR 17.31(a) and (b). This proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the lesser prairie-chicken, except in two instances.

First, we propose that none of the provisions in 50 CFR 17.31 would apply to actions that result from activities associated with a comprehensive conservation program developed by or in coordination with the State agency or agencies responsible for the management and conservation of fish and wildlife within the affected State(s), or their agent(s), and that the Service determines provides a net conservation benefit for the lesser prairie-chicken. The 4(d) special rule identifies a set of criteria the Service proposes to use to evaluate such programs. Among additional considerations, the approval criteria require that the program provides lesser prairie-chicken population and habitat targets necessary to ensure a net conservation benefit for the species across the plan area in addition to mechanisms for achieving those targets. In this way, actions in the comprehensive conservation program will ultimately contribute to the conservation of the species. Conservation is defined in section 3(3) of the Act as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.” As a result of this provision, the Service expects that rangewide conservation actions will be implemented

with a high level of certainty that the program will lead to the long-term conservation of the lesser prairie-chicken.

Second, we also propose that none of the provisions in 50 CFR 17.31 would apply to actions resulting from activities that are included in or covered under NRCS's Lesser Prairie-Chicken Initiative (LPCI). According to the proposed rule, the primary factors supporting the proposed threatened status for the lesser prairie-chicken are the impacts of cumulative habitat loss and fragmentation. Allowing the continuation of agricultural operations consistent with these criteria encourages landowners to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing suitable habitat for the lesser prairie-chicken.

Based on the rationale explained above, the provisions included in this proposed 4(d) special rule are necessary and advisable to provide for the conservation of the lesser prairie-chicken. Nothing in this proposed 4(d) special rule changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the Act or the ability of the Service to enter into partnerships for the management and protection of the lesser prairie-chicken.

Additional Provisions Under Consideration

The Service is considering several additional provisions and specifically seeks

information and comment on the following issues at this time.

First, several approved candidate conservation agreements (CCAs) and candidate conservation agreements with assurances (CCAAs) are in place for the lesser prairie-chicken. We are seeking comment on a provision that would allow continued enrollment in the existing CCAs and CCAAs beyond the effective date of a final listing determination, if the results of our final listing determination conclude that threatened species status is appropriate. The approved agreements for the lesser prairie-chicken include the CCA/CCAA for Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico, developed cooperatively by the Service, the Bureau of Land Management, and the Center for Excellence for Hazardous Materials Management (2008); the Agricultural CCAA for Lesser Prairie-Chickens between Oklahoma Department of Wildlife Conservation and the Service (2013); and the CCAA for Lesser Prairie-Chickens Between Texas Parks and Wildlife Department and the Service (2006).

The Service is also considering whether it is appropriate to include a provision for take of lesser prairie-chicken when that take is in accordance with applicable State law for educational or scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act. An example of an activity that could be covered under such a provision includes presence/absence and population monitoring surveys. Such surveys are typically conducted during the breeding season and may cause disturbance on the breeding grounds, particularly when flush counts are used to estimate the number of birds attending those leks. Occasionally recorded calls are used to aid in the

detection of known or suspected leks, which may cause some disturbance of courting males. However, if surveys are conducted in accordance with scientifically accepted methodologies, minimal short-term impact to lesser prairie-chickens, primarily in the form of harassment, should occur.

The Service is also considering whether it is appropriate to include a provision for take of lesser prairie-chickens in the course of State-managed hunting programs for the lesser prairie-chicken or incidental to legal hunting activities directed at greater prairie-chickens. These two species, which are similar in appearance, overlap in portions of approximately 12 counties in Kansas. Limited mortality of lesser prairie-chickens occurs as a result of hunting activities directed at greater prairie-chickens. We request information and comment on these issues, including State management plans related to hunting regulations and any measures within those plans that may avoid or minimize the risk of lesser prairie-chicken mortality from hunting for greater prairie-chickens.

Finally, the Service is also considering whether it is appropriate to expand the scope of the 4(d) special rule to: (a) Encourage landowners removing their lands from the Conservation Reserve Program to continue managing those areas for the benefit of the lesser prairie-chicken; (b) encourage farmers and ranchers not participating in the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative to manage their lands for the benefit of the lesser prairie-chicken; and (c) allow incidental take of lesser prairie-chickens if the take results from implementation of a comprehensive lesser prairie-chicken conservation program that was

developed by an entity other than a State agency or their agent(s) or was developed without coordination with a State agency or their agent(s).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our determination of status for this species is based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the reopening of the public comment period, on our use and interpretation of the science used in developing our proposed rule to list the lesser prairie-chicken and this proposed 4(d) special rule.

We will consider all comments and information we receive during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) be logically organized; (b) use the active voice to address readers directly; (c) use clear language rather than jargon; (d) be divided into short sections and sentences; and (e) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We intend to incorporate this proposed special rule into our final determination concerning the listing of the species or withdrawal of the proposal if new information is provided that supports that decision.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

By letter dated April 19, 2011, we contacted known tribal governments throughout the historical range of the lesser prairie-chicken. We sought their input on our development of a proposed rule to list the lesser prairie-chicken and encouraged them to contact the Oklahoma Ecological Services Field Office if any portion of our request was unclear or to request additional information. We did not receive any comments regarding this request.

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2012–0071 or upon request from the Field Supervisor, Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 77 FR 73828 (December 11, 2012) as follows:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

2. Amend § 17.11(h) by adding an entry for “Prairie-chicken, lesser” to the List of Endangered and Threatened Wildlife in alphabetical order under Birds to read as set forth below:

§17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* * * * *	* * *						

Birds * * * * *							
Prairie-chicken, lesser	(<i>Tympanuchus pallidicinctus</i>)	U.S.A. (CO, KS, NM, OK, TX)	Entire	T		NA	17.41(a)
* * * * *							

3. Amend § 17.41 by adding paragraph (a) to read as follows:

§ 17.41 Special rules—birds.

(a) Lesser prairie-chicken (*Tympanuchus pallidicinctus*).

(1) *Prohibitions.* Except as noted in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 apply to the lesser prairie-chicken.

(2) *Exemptions from prohibitions.* Incidental take of the lesser prairie-chicken will not be considered a violation of section 9 of the Act if the take results from any of the following:

(i) Implementation of a comprehensive lesser prairie-chicken conservation program that:

(A) Was developed by or in coordination with the State agency or agencies, or their agent(s), responsible for the management and conservation of fish and wildlife within the affected State(s);

(B) Has a clear mechanism for enrollment of participating landowners; and

(C) Was determined by the Service to provide a net conservation benefit to the lesser prairie chicken, in consideration of the following:

(1) Comprehensively addresses all of the threats affecting the lesser prairie-chicken within the program area;

(2) Establishes objective, measurable biological goals and objectives for population and habitat necessary to ensure a net conservation benefit, and provides the

mechanisms by which those goals and objectives will be achieved;

(3) Includes the administrative and funding mechanisms necessary for effectively implementing all elements of the program, including enrollment of participating landowners, monitoring of program activities, and enforcement of program requirements;

(4) Employs an adaptive management strategy to ensure future program adaptation as necessary and appropriate; and

(5) Includes appropriate monitoring of effectiveness and compliance.

(D) Is periodically reviewed by the Service as meeting the objective for which it was originally established under paragraph (a)(2)(i)(B) of this section.

(ii) Conservation practices on privately owned agricultural land which:

(A) Are carried out in accordance with a conservation plan for such land developed by the Natural Resources Conservation Service (NRCS); and

(B) Were evaluated in the June 30, 2011, conference report issued by the Service to the NRCS in connection with the NRCS's Lesser Prairie-Chicken Initiative.

* * * * *

Dated: April 29, 2013

Signed: Daniel M. Ashe

Director, Fish and Wildlife Service

Billing Code 4310–55

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